MISCELLANY.

Samuel T. Ansell, Soldier, Lawyer and Patriot.—The following defence of General Ansell, formerly acting Judge Advocate General, who gained much undeserved notoriety because of his connection with the Bergdoll case, appeared as the leading editorial in the September-October number of *The Lawyer and Banker:*

That no citizen, civilian or soldier, should be deprived of his life, liberty or property without due process of law, and that "due process of law" means an opportunity for a hearing, with a trial and right of appeal according to statutes regulating procedure against an accused person, and that punishments shall not be excessive to the point of cruelty or inhumanity, and that neither the life, liberty nor property of any such person shall be subject to the caprice or will of any executive, whether he be a civilian or a military commander—these have been the fundamental principles of English jurisprudence ever since the time when King John at Runnymede was forced to sign Magna Charta and thereby yield up forever the tyrannical authority theretofore asserted and exercised over the liberties and rights of the individual citizen.

These protections against oppression, caprice, persecution and cruelty became written into the fundamental law of the Federal Government and of the government of each of the United States in the forms of the various bills of rights which have been the essential features of the constitutions of our Nation and of every State, ever since the Declaration of Independence was followed by the establishment of the American Government founded upon the right of every citizen to be vouchsafed against cruelty and oppression.

Because he stood staunchly and fearlessly and persistently for the enforcement of these principles, Samuel T. Ansell has become the victim of persecution in connection with the famous Bergdoll case.

A Federal statute, of long standing and enacted for the precise purpose of safeguarding the rights of trial and appeal in cases of prosecution by courtmartial, provided that all convictions by courtmartial should be revised and reviewed by the Judge Advocate General. In many cases of most grave punishment that statute was ignored during the late World War and the fate of an accused soldier depended entirely upon the arbitrary will of some individual military commander. Without the hearing or appeal vouchsafed by fundamental law and expressly made a part of the Federal Statutes, enlisted soldiers were accused, tried and executed with less notice or chance of defense or appeal than allowed generally to the victims of the Soviet atrocities of the present-day regime in Russia, or without even the formality accredited to the cruelties of old-time nabobs in India, or to the chiefs of the primitive cavemen.

Before Armistice Day in 1918 three non-commissioned officers serving in the mobilizing camps in Texas, were courtmartialed and sen-

tenced to the penitentiary for long periods for offenses which would not ordinarily be dignified by the charge by disorderly conduct. In this and other cases the statute, expressly providing for suspension of execution of sentence until reviewed by the proper authorities at Washington, was entirely ignored.

Ansell had become Acting Judge Advocate General and the abuses and possibilities of abuses, of cruelties, of barbaric punishments, of the disregard of the fundamental, constitutional and statutory provision for hearing and appeal under the courtmartial system as exercised, came to his attention. He had from his early life been a soldier, educated in his home State, North Carolina, and a graduate of West Point and, by temperament and training, a skilled lawyer. He had served in the line through the Phillipine insurrection, then had been a law instructor at West Point and had stayed in the army service when the Mexican War troubles and the menance of the European war appealed to his patriotism and, instead of resigning to private life and law practice, he answered the call of duty and remained in the service. He was refused the opportunity of going to the front in Europe because of his experience and great capacity for the law and was made Assistant Judge Advocate General, and later, when America entered the war, he was given the position of Acting Judge Advocate General with the rank of General.

In his official position by the War Department he attempted to humanize the courtmartial system, first by insisting upon observance of the statutory rights of the convicted soldier to a review, and, second, by advocating laws and regulations which would make the courtmartial one of justice instead of brutality.

His superiors, however, were afraid to face squarely the issues involved and preferred to permit barbaric practices to continue rather than, by co-operating in working out reforms, to admit the existence of mal-administration by themselves and their subordinates. To them any temporary publicity of cruelty was worse than its perpetuation. He was denied assistance, he was rebuked, and then he resigned and entered into his private law practice in Washington. As a private citizen and lawyer he persisted in attempting to bring from without the reforms which he had found impossible to accomplish from within the War Department. He carried his case before the American lawyers and before the Congress, and succeeded in putting through statutory remedial measures which made the former abuses of the courtmartial system impossible.

But thereby he made enemies, not only within the War Department but within the party supporters of the Democratic head of that Department, and now for over three years he has been the particular object of their persecution.

They have succeeded in entangling his name in the Bergdoll disgrace in their attempt to make him the scapegoat in a matter in which he was perfectly innocent. They brought on the so-called Bergdoll

inquiry in Congress and contrived to consummate a most partisan and unjust finding that the slacker Bergdoll had escaped justice through his connivance.

Certain criticisms are made against General Ansell in the Bergdoll case. The first is that as a private lawyer he took a retainer from the Bergdoll family for rendering services as a lawyer in behalf of Bergdoll, not to save him from punishment, if guilty, but to see that he had a fair trial. Some good lawyers still criticise his action in this regard, first on the ground that, having been an attorney for and in the War Department, he should not have taken any case in which the War Department was interested. But any such grounds of criticism vanish when it is remembered that even the beginnings of the Bergdoll case were subsequent to his separation from the War Department. But the second ground of criticism is that he consented to act in any capacity as a lawyer for Bergdoll. because it is said Bergdoll was such a disgraceful slacker that his case should have been left entirely to his prosecutors without defense. General Ansell knew his privileges and duties as a lawyer and acted accordingly. His action was in accordance with the highest and most approved precedents and was not only consistent with, but was in observance of the positive requirements of every code of ethics of the legal profession from the time of Blackstone to date. (Note.)

An examination of the evidence in regard to Bergdoll's escape shows that the blame was entirely upon the War Department in their failure to exercise ordinary caution in guarding Bergdoll in his trip to the Maryland mountains for the buried treasure, and because they ignored the express precautions specified by General Ansell himself when he asked that Bergdoll be allowed the privilege of regaining his hidden treasure, and particularly the point that General Ansell made that they should not pass through Philadelphia or allow Bergdoll out of the sight of the special army guards which Ansell had advised.

Nor was Ansell culpable in requesting the War Department to allow Bergdoll to make the trip. Ansell was only secondary advisory counsel to the special family attorneys of Bergdoll. They and Bergdoll had assured him that the hidden treasure existed. Ansell checked the matter up and found the fact to be, which is not now disputed, that Bergdoll had actually withdrawn, a short time before, over $100,000 in gold from the Treasury in Washington. He had every reason to believe that the story of the hidden treasure was true. Indeed, it is not yet proven untrue. Bergdoll was confined at Governor's Island on the charge of avoiding the draft. There was nothing prejudicial to the War Department's prosecution that he should have the privilege of regaining possession of the large store of gold, the location of which was alone known to him and which he could not safely disclose except in connection with his own personal visit and under a guard which, at the same time that it would insure the War Department

against his escape, would also safeguard him in the recovery ot his treasure.

As to whether Ansell was deceived in the treasure story is yet a question of doubt; but everyone who knows him knows that he is incapable of participation in any dishonest or underhand transaction. The entire evidence shows that he was perfectly innocent of any connivance, either directly or indirectly, in the escape of Bergdoll.

General Ansell has proven himself a soldier. He has demonstrated that he is a lawyer of great experience and capacity. Moreover, through his successful fight against most disheartening obstacles for justice to the enlisted soldier, and the persistent attempt of his opponents, within and without the War Department, whom he defied in their attempt to cover up and to perpetuate the abuses of the courtmartial system, to wreak vengeance upon him and through the sacrifices which he has made, he has achieved in a few months an honor which would be ample to crown a life work. His is the record of a hero and a patriot.

NOTE:—Canon 5 of the Code of Ethics of the American Bar Association is as follows:

"It is the right ot a lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise, innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and honorable means to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty but by due process of law."

Every treatise on the subject of legal ethics quotes the following from Blackstone:

"Let the circumstances against the person be ever so atrocious, it is still the duty of the advocate to see that his client is convicted according to those rules and forms which the wisdom of the legislatures have established as the best protection and security of the subject."

Lord Erskine, when criticised for undertaking the defense of a criminal, said:

"From the moment that any advocate says that he will not stand between the Crown and the subject arraigned in the court where he daily sits to practice, from that moment the liberties of England are at an end."

The right of the accused to have, and the right and duty of the lawyer to give, defense is worthless if it is to be denied or modified in the least because of the heinousness of the offense charged or of the apparent certainty of guilt. The more grave the charge, the more sacred becomes the right of the accused to a hearing and the more compelling becomes the duty of the lawyer to intervene for the safeguarding of a fair trial.

Right of Public Service Company to Alter Rates Fixed by Contracts.—The problem which the public utilities of the country are seeking to solve to-day is how they may legally increase their rates in spite of long term contracts with private consumers, which in many instances call for service at prices below present costs,[1] and especially do they want to know whether they may do this on their own initiative, or must they first obtain the permission of the commission or other rate regulating body.

In V. & S. Bottle Co. *v.* Mountain Gas Co.[2] the Supreme Court of Pennsylvania recently upheld the legal right of the defendant natural gas company to discontinue service under a low-rate, ten-year contract entered into between its predecessor and the plaintiff in October, 1913, and to require the latter to pay increased rates as per schedule filed by the defendant with the State Public Service Commission, on the ground that though said contract was valid and binding between the parties when made it became unlawful and inoperative when the public utility act[3] went into effect January 1, 1914, as it contravened the provisions of that statute against discrimination.

It is settled that the general police power of the state embraces the regulation of the service and rates of public utility enterprises for the promotion of public convenience and the general welfare,[4] and that the exercise of this power may be delegated to a municipality, commission or other administrative body.[5]

Thus the courts hold that all contracts or grants relating to public service entered into between the private person or corporation operating a public utility and the municipality or the private consumer contain from the very nature of their subject matter an implied

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[1] See *Re* Marion Light & Heating Co. (Ind. Pub. Serv. Com.), P. U. R. 1918D, 692; *Re* Oklahoma Gas & Electric Co. (Okla. Corp. Com.), P. U. R. 1918D, 216.

[2] Pa. Sup. Ct., June 3, 1918, 13 Rate Research, 335.

[3] Pennsylvania Public Service Company Law (1913), 6 PURDON'S DIGEST, 7206; Supplement, 1915.

[4] Munn *v.* Illinois, 94 U. S. 113 (1876); Chicago, Burlington & Quincy R. Co. *v.* Iowa, 94 U. S. 155 (1876); Chicago, Burlington & Quincy R. Co. *v.* Nebraska, 170 U. S. 57, 71-72 (1898); Portland Railway, Light & Power Co. *v.* Oregon Railroad Commission, 229 U. S. 397 (1913); City of Woodburn *v.* Public Service Commission of Oregon, 82 Ore. 114, 161 Pac. 391 (1916); Onondaga Golf & Country Club *v.* Syracuse & S. R. Co., 96 Misc. 499, 160 N. Y. Supp. 693 (1916); Mississippi R. R. Commission *v.* Mobile & Ohio R. R. Co., 244 U. S. 488 (1917); Winfield *v.* Public Service Commission, 118 N. E. 531 (Ind.) (1918); State *ex rel.* City of Sedalia *v.* Public Service Commission, 204 S. W. 497 (Mo.) (1918).

[5] Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047 (1894). See Atlantic Coast Electric Ry. Co. *v.* Board of Public Utility Commissioners, 104 Atl. 218 (N. J.) (1918); Trustees of Saratoga Springs *v.* Saratoga Gas, Electric Light & Power Co., 191 N. Y. 123, 146, 83 N. E. 693 (1908).

reservation of the right of the state to lawfully exercise its police power for the general welfare, and that there is no impairment of obligations of contract within the guarantees of the state or federal constitution even though said contract is thereby rendered partially or wholly invalid.[6]

This development has wrought a fundamental change in view-point in the law of public utilities, and to-day the primary consideration is not whether the exercise of the state's regulatory power impairs the obligation of the public service contract, but whether that contract tends to abridge this power of the state.[7]

To return to our problem, the public utility proprietor must needs know when this long-term contract, which the courts agree was binding at the time made, ceases to be so, and what then become his rights or duties in the premises.

In the instant case the court held the point of cleavage to have been on the day the public service act took effect—yet the facts showed that on two different occasions thereafter the defendant utility company filed with the commission a tariff for that class of service at the same rate provided for under said contract and charged and collected said rate until April, 1917. As pointed out by a recent writer,[8] this fact may have no significance as to the real legality of said contract, for the plaintiff may have been the only consumer of

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[6] Kansas City Bolt & Nut Co. *v.* Kansas City Light & Power Co., 204 S. W. 1074 (Mo.) (1918); City of Fulton *v.* Public Service Commission, 204 S. W. 386 (Mo.) (1918); Collingswood Sewerage Co. *v.* Borough of Collingswood, 102 Atl. 901 (N. J.) (1918); Raymond Lumber Co. *v.* Raymond Light & Water Co., 92 Wash. 330, 159 Pac. 133, P. U. R. 1916F, 437 (1916); McCook Irrigation & Water Power Co. *v.* Burtless, 99 Neb. 250, 152 N. W. 334 (1915); Union Dry Goods Co. *v.* Georgia Public Service Corporation, 142 Ga. 841, 83 S. E. 946, 947 (1914); Minneapolis, St. Paul, etc., Ry. Co. *v.* Menasha Wooden Ware Co., 159 Wis. 130, 150 N. W. 411, 413 (1914); Idaho Power & Light Co. *v.* Blomquist, 26 Idaho, 222, 141 Pac. 1083 (1914); *Re* Rates of the Bridge Operating Co., 3 P. S. C. R. (1st Dist. N. Y.) 226 (1912); aff'd 153 App. Div. (N. Y.) 129, 138 N. Y. Supp. 434 (1912); Portland Ry. Light & Power Co. *v.* City of Portland, 200 Fed. 890 (1912).

A fortiori the same principles govern contracts between two private companies which function successively in furnishing a public service—the one producing and the other distributing the product supplied. Oklahoma Natural Gas Co. *v.* Corporation Commission. P. U. R. 1918D, 515 (1918).

[7] See Kansas City Bolt & Nut Co. *v.* Kansas City Light & Power Co., 204 S. W. 1074 (Mo.) (1918); City of Chicago *v.* O'Connell, 278 Ill. 591, 116 N. E. 210, P. U. R. 1917E, 730; President & Trustees of Village of Kilbourn City *v.* Southern Wisconsin Power Co., 149 Wis. 168, 135 N. W. 499 (1912).

[8] See Ralph J. Baker, "The Binding Force of Term Contracts as Applied to Public Utility Rates," page 34. Paper read at Third Annual Convention of the New Jersey Utilities Association, Atlantic City, N. J., October, 1917.

this class of service, or likely to require it, and, irrespective of that, the publishing and filing of a low contract rate as a class rate does not prevent it being unlawful if it results in actual discrimination against other classes of consumers, as the court found it did here.

The most important feature of the case from the view-point of our problem is that in a suit in equity by the consumer for specific performance of the contract, and for an injunction restraining the defendant from cutting off its service in violation thereof, the court dismissed the bill and sustained the legal right and power of the utility company to take the initiative in increasing its rates and discontinuing service under the old contract without going to the Public Service Commission for leave to do so.

This case represents what may be termed the first of two general views in upholding the legal right of the public utility company, subsequent to the passing of a public service law creating a commission empowered to regulate rates, to increase on its own initiative its rates for service above the maximum fixed by contract made with a private consumer prior to said act, and admittedly valid when made.[9]

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[9] Onondaga Golf & Country Club *v.* Syracuse & S. R. Co.; Denver & South Platte Ry. Co. *v.* City of Englewood Colo., 161 Pac. 151, P. U. R. 1916E, 134 (1916); Mullen & Co. *v.* Denver & Rio Grande R. Co. (Colorado Public Utilities Commission), P. U. R. 1916E, 128; Minneapolis, St. Paul & S. S. Ry Co. *v.* Menasha Wooden Ware Co., 159 Wis. 130, 150 N. W. 411 (1914); Wolverton *v.* Mountain States Telephone & Telegraph Co., 58 Colo. 58, 142 Pac. 165 (1914); Alpena Electric Light Co. *v.* Kline, 180 Mich. 279, 146 N. W. 652 (1914); State *v.* Martyn, 82 Neb. 225, 117 N. W. 719 (1908).

It has been held in New Jersey that the Public Utilities Act permits the utility to file a new schedule of rates without first obtaining permission of the Board.

Re Public Service Electric Co. (New Jersey Board of Public Utility Commissioners), P. U. R. 1918E, 898 (1918).

And in New York a very recent case holds the Public Service Commissions Law (CONSOL. LAWS, c. 48) places no restriction on the right of gas companies to increase rates and make the increase effective prior to the time when the Public Service Commission shall determine whether the proposed increase is just and reasonable. Pub. Service Commission, Second District *v.* Iroquois Natural Gas Co., 171 N. Y. Supp. 370 (1918).

Under the Illinois Public Utilities Act the same decision has been reached, but restricted to the schedules of rates only. State Public Utilities Commission *v.* Chicago & West Towns Ry. Co., 275 Ill. 555, 114 N. E. 325 (1916).

Cases to the same effect under the Interstate Commerce Act, as to contracts made before the act and valid when made: Southern Wire Co. *v.* St. Louis Bridge & Tunnel Co., 38 Mo. App. 191 (1889); Louisville & Nashville R. Co. *v.* Mottley, 219 U. S. 467 (1911); Dorr *v.* Chesapeake & Ohio Ry. Co., 78 W. Va. 150, 88 S. E. 666 (1916); Carter Planing Mill Co. *v.* New Orleans R. Co., 112 Miss. 148, 72 So. 884 (1916).

In the following cases the customers of the utility companies were

The second view is presented in several recent cases which have held that the public service acts of their respective jurisdictions worked no change in existing rates; that, therefore, rates fixed by a previously valid contract remain binding on the parties and do not become unlawful unless and until the State Commission duly determines them to be so, and that the utility company accordingly has no legal right to discontinue said contract on its own initiative prior to such decision.[10]

In some states[11] this point is expressly provided for in the public service statute denying to the public utility the right to itself increase the maximum rates fixed in any contract or grant under which it was operating at the time the act took effect during the term of said contract or grant.

These statutes have been construed to in no way limit the power of the commission to increase said maximum rates during the life of the contract or grant, nor to deprive the utility of the right to apply to the commission for such an increase before the expiration of said term.[12] It has been held that a statute which denies the utility an opportunity to apply for an alteration in rates is unconstitutional.[13]

It is submitted that in the absence of such statutory provisions the first of the two views discussed is more in accord with the funda-

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made subsequent to the passage of the Interstate Commerce Act, and valid when made, but rendered invalid under the act by the public utilities raising the rates for like service to others in the manner provided by law: New York, New Haven & Hartford R. Co. *v.* Interstate Commerce Commission, 200 U. S. 361 (1906); Armour Packing Co. *v.* United States, 209 U. S. 56 (1908)

[10] Manitowoc *v.* Manitowoc & Northern Traction Co., 145 Wis. 13, 28, 129 N. W. 925 (1911); Sultan Timber Co. *v.* Great Northern R. Co., 58 Wash. 604, 109 Pac. 320 (1910) (Washington statute in force then did not expressly except existing contract rates from the prohibition against discrimination).

A case going much further and holding that even the commission did not have power to increase rates in spite of a contract is Public Service Electric Co. *v.* Board of Public Utility Commissioners and City of Plainfield, 88 N. J. L. 603, 96 Atl. 1013 (1916).

[11] Washington Public Service Commission Law, 1911, § 34 (GEN. STAT. 1915). §§ 8626-34, relating to gas, electric and water companies, but there is no corresponding provision as to common carriers (*semble* §§ 20-21) GEN. STAT., §§ 8626-20, 21. Indiana Public Service Act, 1913, § 7 (BURNS' ANN. STAT. 1914), ch. 124A, §§ 10052 g-7); Illinois Public Utilities Act, § 36 (HURD'S REV. STAT., 1915-16, c. 111 *a*, § 36); Utah Public Utilities Commission Act, Laws of Utah, 1917, ch. 47, art. 3, § 5.

[12] Raymond Lumber Co. *v.* Raymond Light & Water Co., 92 Wash. 330, 159 Pac. 133, P. U. R. 1916F, 437 (1916); Winfield *v.* Public Service Commission, 118 N. E. 531, 537 (Ind.) (1918); State Public Utilities Commission *v.* Chicago, Peoria & St. Louis Railroad Co., 118 N. E. 427 (Ill.) (1917); Salt Lake City *v.* Utah Light & Traction Co., 173 Pac. 556 (Utah), P. U. R. 1918F, 377.

[13] Trustees of Saratoga Springs *v.* Saratoga Gas, Electric Light & Power Co., 191 N. Y 123, 83 N. E. 693 (1908).

mental principles of the law of public utilities, and that the same view should be taken of term contracts made subsequent to the passage of the public service law, or other regulating statute, unless the provisions of the act do not permit of that construction.[14]

A fortiori the public service commission, or similar body, may alter rates fixed by long term contract during said term, whether such contract was made before or after the empowering act,[15] unless said act is construed to be prospective only as to that particular type of contract;[16] and increases made in rates by the public utility pursuant

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[14] Osborne *v.* San Diego Land & Town Co., 178 U. S. 22 (1900), affirming Lanning *v.* Osborne, 76 Fed. 319 (1896); President & Trustees of Village of Kilbourn City *v.* Southern Wisconsin Power Co., 149 Wis. 168, 135 N. W. 499 (1912); Birmingham Waterworks Co. *v.* Brown, 67 So. 613 (Ala.) (1914).

[15] Atlantic Coast Electric Ry. Co. *v.* Board of Public Utility Comm'rs, *supra;* Salt Lake City *v.* Utah Light & Traction Co., *supra;* Whitcomb *v.* Duquesne Light Co. (Pa. Pub. Serv. Com. 1916), P. U. R. 1917B, 979; City of Woodburn *v.* Public Service Commission, *supra;* Raymond Lumber Co. *v.* Raymond Light & Water Co., *supra;* Pinney & Boyle Co. *v.* Los Angeles Gas & Electric Corporation, 168 Cal. 12, 141 Pac. 620 (1914); Portland Railway Light & Power Co. *v.* City of Portland, *supra.*

For cases distinctly upholding power of commission, or other lawfully authorized administrative body, to reduce rates below those fixed by contract, see Rogers Park Water Co. *v.* Fergus, 180 U. S. 624 (1901); City of Chillicothe *v.* Logan Natural Gas & Fuel Co., 8 Ohio N. P. 88 (1901).

Recent decisions to effect that power to establish just and reasonable rates includes power to increase them, in excess of the maximum fixed by contract or agreement. Collingswood Sewerage Co. *v.* Borough of Collingswood, 102 Atl. 901 (N. J.); P. U. R. 1918C, 261. People *ex rel.* New York & North Shore Traction Co. *v.* Public Service Commission of New York, Second District, 175 App. Div. 869, 162 N. Y. Supp. 405; P. U. R. 1917B, 957 (1910). See 31 HARV. L. REV. 1168.

And even though the contract rate was approved by the commission when made: The Golden Cycle Mining & Reduction Co. *v.* The Colorado Springs Light, Heat and Power Co. (Col. Pub. Util. Com.), 13 Rate Research, 131 (1918); *Re* Public Service Electric Co., P. U. R. 1918E, 898.

The unique case of a public utility company objecting that a minimum rate was too rigid was presented in Economic Gas Co. *v.* City of Los Angeles, 168 Cal. 448, 143 Pac. 717 (1914).

The so-called beneficiary right of the consumer in public service rate-contracts between other parties which tend to redound to his benefit has been discussed in some recent cases: Borough of North Wildwood *v.* Board of Public Utility Commissioners, 88 N. J. L. 81, 95 Atl. 749; P. U. R. 1916B, 77 (1915). See Collingswood Sewerage Co. *v.* Borough of Collingswood, *supra. Cf.* Natick-Framingham-Marlboro Gas Petition (Mass. B'd Gas & Electric Light Comm'rs, May, 1918), 13 Rate Research, 200.

[16] Public Service Electric Co. *v.* Board of Public Utility Commissioners and City of Plainfield, 88 N. J. L. 603, 96 Atl. 1013 (1916). See Salt Lake City *v.* Utah Light & Traction Co., *supra.*

to the determination of the commission as to what is a just and reasonable rate become effective when filed and apply alike to contract and non-contract consumers.[17]

To determine when the contract rate becomes unlawful, we must consider the situation in states which have not yet adopted commission regulation of public service rates, and in those jurisdictions where certain utilities are not governed so strictly in this respect by the public utilities act in force.

The basic principles of the law of public utilities require that rates must be just and reasonable in order to provide a fair return on the investment,[18] and to enable the utility to maintain a safe, adequate and efficient service. Therefore it seems clear that whenever the rates for the public service, though fixed by long termed contracts between the utility and its customers, become so low as to be unjust and unreasonable and to directly tend to disable the company from performing its public service, obligations, as defined above, said rates are *ipso facto* unlawful and void, and it is the legal duty, not the privilege, of the public utility enterprise to discontinue performance of said contracts and to increase its rates to the point that they are again just and reasonable.[19] Of course, the converse is true as to contract rates which changing conditions may render too high and unjust and unreasonable to the public.[20] These principles apply equally to contracts which for any reason become discriminatory.[21] As stated in a recent case the public service acts have not

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[17] *Re* Public Service Electric Co., *supra;* The Golden Cycle Mining & Reduction Co. *v.* The Colorado Springs Light, Heat & Power Co., *supra.*

[18] Smyth *v.* Ames, 169 U. S. 466 (1897); Knoxville *v.* Knoxville Water Co., 212 U. S. 1 (1908); Willcox *v.* Consolidated Gas Co., 212 U. S. 19 (1908); Cedar Rapids Gas Co. *v.* Cedar Rapids, 223 U. S. 655 (1912), affirming 144 Ia. 426 (1909); Mississippi Railroad Commission *v.* Mobile & Ohio R. Co., 244 U. S. 388; P. U. R. 1917E, 791; Darnell *v.* Edwards *et al.* (Miss. R. Comm.), 244 U. S. 564 (1917). See State *ex rel.* Webster *v.* Superior Court, 67 Wash. 37, 120 Pac. 861 (1915).

[19] Oklahoma Natural Gas Co. *v.* Corporation Commission of Oklahoma (Okla.); P. U. R. 1918D, 515 (1918); Northampton, Easton & Washington Traction Co. *v.* Board of Public Utility Comm'rs, 102 Atl. 930 (N. J.) (1918); State Public Utilities Commission *v.* Chicago & West Towns Ry. Co., 275 Ill. 555; 114 N. E. 325 (1916); City of Louisiana *v.* Louisiana Water Co. (Mo. Pub. Serv. Comm.) P. U. R. 1918B, 774.

For these principles applied to a municipal franchise see Atlantic Coast Electric Ry. Co. *v.* Board of Public Utility Comm'rs, 104 Atl. 218, 220 (N. J.) (1918).

[20] Whitcomb *v.* Duquesne Light Co. (Pa. Pub. Serv. Com. 1916), P. U. R. 1917B, 979.

[21] State *ex rel.* American Union Telegraph Co. *v.* Bell Telephone Co. of Missouri, 22 ALBANY LAW JOURNAL, 363 (St. Louis Cir. Ct.) (1880); The Inter-Ocean Publishing Co. *v.* The Associated Press, 184

changed the law in this respect.[22]

Obviously, a contract the performance of which thus conflicts with the legal duty owed by the utility enterprise to the public is unlawful and outside the protection of the contract clause of the State or Federal Constitution.

Quære:—Would it not be desirable, in view of the modern public service acts empowering the commissions to restrict competition, to treat all long term contracts fixing rates for public service as void *ab initio*, because inherently tending to violate the basic policy of regulation of public utility rates as herein explained.[23]—*Harvard Law Review.*

Judicial Sarcasm.—In Nichamin *v.* United States, 263 Fed. 882, the court said:

"It is also claimed that it was error for the district attorney to say in the course of his argument: 'I ask you to find him guilty as charged in the indictment.' This statement could hardly be prejudicial. No doubt the jury by that time had discovered that the purpose of the prosecution was to secure conviction of the accused of the crime charged, and it would seem that the district attorney might just as well openly and frankly admit that fact, as to make any efforts at concealment of his purpose."

Death from Operation Not Result of Accidental Injury.—A servant while assisting other workmen in lifting an automobile body sustained a double hernia, and in the course of a few days an operation was performed by two surgeons, one of which operated for the hernia on the left-hand side, and the other for the hernia on the right-hand side. When the incision was made by the latter the appendix appeared in the opening and was removed, with the consent of the other physician. The injured man had requested that the appendix be removed when the operation for the hernia was being performed. About 10 days later with the permission, but not the approval, of the hospital authorities, the patient was allowed to go home, where he remained a few weeks, when he was returned to the hospital, where he died within a few hours from peritonitis. The widow and son of the deceased were awarded compensation under the Workmen's Compensation Act by the New York Industrial

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Ill. 438, 450; 56 N. E. 822 (1900); Birmingham Waterworks Co. *v.* Brown, 191 Ala. 475, 67 So. 613 (1914).

[22] See Atlantic Coast Electric Ry. Co. *v.* Board of Public Utility Comm'rs, *supra.*

[23] See Manitowoc *v.* Manitowoc & Northern Traction Co., 145 Wis. 13, 129 N. W. 925 (1911); Wolverton *v.* Mountain States Telephone & Telegraph Co., 58 Colo. 58, 142 Pac. 165 (1914); Atlantic Coast Electric Ry. Co. *v.* Board of Public Utility Comm'rs, *supra.*

Commission, which award was reversed, and the case remitted for further proof by the Appellate Division of the Supreme Court for the Third Department in Hoffman *v.* Pierce Arrow Motor Car Co., 183 New York Supplement, 766. Judge Henry T. Kellogg wrote the opinion, in the course of which it was said: "It is clear that the operation upon the appendix was not made necessary by the accident which caused the hernia. As the only medical testimony given, tracing the peritonitis and death back to the operations, is that of Reagan, who impliedly gives the appendix operation as the cause, it follows that the death was not shown to have resulted from an accidental injury occurring in the course of the employment. It is a significant fact that the two noted physicians who performed the autopsy were not called, so that the only medical testimony appearing in the record was given by surgeons interested in absolving themselves from blame. In view of this fact, it appears to us that the just course to follow is not to dismiss the claim, but to return it to the commission for further proof as to the causal relation between the accidental injury and the death."

Membership in Communist Party as Ground for Deportation of Alien.—The Act of Congress of October 16, 1918 (U. S. Comp. St. Ann. Supp. 1919, § 4289¼b [1] and § 4289¼b [2]) providing that aliens who are members of, or affiliated with, any organization that entertains a belief in, teaches, or advocates the overthrow by force or violence of the Government of the United States may be deported, has received conflicting judicial construction in two United States District Court decisions. Colver *v.* Skeffington (Dist. Mass.), 265 Fed. 17; United States *v.* Wallis, (S. Dist. N. Y.) 268 Fed. 413.

In the first case cited it was held that the mere fact that an alien was a professedly active member of the Communist Party of America was not sufficient grounds for his deportation, on the theory that the end of the party is radically to change our government, but not to overthrow it. The other case holds that the clear import of the Communist literature is that membership in such party is ground for deportation, which is not prevented by a denial by such person of intention to use violation for the overthrow of the government.

The Donkey and the "Last Clear Chance" Doctrine.—The humble donkey unwittingly gave rise to the "last clear chance" doctrine, which was first applied in the celebrated English case of Davies *v.* Mann, 10 M. & W. 546. It appeared that plaintiff after fettering the forefeet of his donkey, turned it into a public highway to graze. Defendant's servant, driving at a "smartish pace," ran into the donkey. Plaintiff was nevertheless allowed to recover, since defendant's servant might, by proper care, have avoided killing the animal. The Supreme Court of Mississippi in Fuller *v.* Illinois Central R. Co.,

100 Miss., 705, 717, 56 South., 783, paid the following tribute to this case and its chief actor:

"The groans, ineffably and mournfully sad, of Davies' dying donkey have resounded around the earth. The last lingering gaze from the soft, mild eyes of this docile animal, like the last parting sunbeams of the softest day in spring, has appealed to and touched the hearts of men. There has girdled the globe a band of sympathy for Davies' immortal 'critter.' Its ghost, like Banquo's ghost, will not down at the behest of the people who are charged with inflicting injuries, nor can its groanings be silenced by the rantings and excoriations of carping critics."

The Legal Profession of Scotland.—The welcome recently given by the Scots Bar to the leaders of Bench and Bar in England calls attention once more to the curiously different organizations of the two Bars, English and Scots, which has grown up in the course of history. The English Bar has resulted from the permission given by the King's Bench, in the Middle Ages, to the Sergeants and Barristers-of-Law, in the numerous Inns of Court which then existed, to practice before them. The Inns of Court, in those days, like the colleges of Oxford and Cambridge, were hostels where law students lodged while engaged in the study of their profession. Such students were then called apprentices, and were one and all articled to masters, whether barristers or attorneys. The rank of barrister was a degree like that of bachelor or master at Oxford. The sergeants corresponded to the later Benchers. How different the Scots Bar. To begin with, in Scotland, until the reign of James V, no Supreme Court existed. The sheriffs dispensed justice in the burghs and the feudal lords in the counties. Professional lawyers of any kind were quite unknown. It was James V who changed all this. In 1552 he set up the Court of Session (modelled on the French Parliament of Paris), and the High Court of Justice; these consisted of fifteen "Lords of Session" (since reduced to thirteen) and were the supreme civil and criminal courts respectively. Each Lord of Session is also a "Senator of the College of Justice," and as such goes on circuit to try the "Pleas of the Crown," *i. e.*, murder, arson, robbery, rape. Lesser criminal offenses, whether indictable or summary, are tried by the Sheriff in the Sheriff Court and the Sheriff-Police Court respectively; these correspond to the English Quarter and Petty Sessions. The Lord of Session was at first possessed of a seat in the Scots Parliament among the peers, but this right was not retained in later days. Once the Court of Session was formed, the Lords of Session promptly proceeded to admit two classes of lawyers to practise before them, namely, Advocates and writers of the Signet, who corresponded to the French "Avocats" and Avouees." To this day the Court of Session consists of the Lord President, Lord Advocate, Lords Ordinary, Advocates, and Writers of the Signet. The Sheriffs copied the

fashion of admitting privileged pleaders and formed county corporations of "writers" or "procurators," the urban and rural lawyers respectively, who have since been given the statutory name of "law-agents" and correspond to the English solicitors.

For some centuries after its foundation by James V, the Scots Court of Session was the great Institution of the country. The Scots Parliament seldom met and was never really powerful except in the reign of Queen Mary. The Lords of Session formed great territorial families, known as the "Noblesse du Robe," as in France, and they gradually confined the membership of the Bar to scions of their families. An outsider would be admitted only by special grace. It was a great feather in Sir Walter Scott's cap when he, not a member of the privileged noblesse du robe, but the son of a Writer of the Signet, found his way to the Bar. It was not until 1832, indeed, that this exclusive privilege was done away with in Scotland. The modern advocate has to take, first an Arts and then a Law degree at a Scots University; this means six or seven years' study. Then he spends a "year of idleness," when he must follow no lucrative occupation; the old practice was for the "Intrant," as he was called, to spend his "year of idleness" at Leyden University in Holland, studying the Roman-Dutch system of law on which that of Scotland is modelled. But this practice no longer is universal; many intrants spend this year reading in chambers. At the end of the year, the intrant has to write a thesis in Latin on a "Title of the Pandects," and defend it before three advocates appointed by the faculty. He is then called, as in England. But the fees are much heavier, and increase with age. At 25 they are about £450, and the increase is about £25 per year thereafter. The reason is that the fee includes a single payment premium for insurance in favor of the advocate's "widow," and naturally the amount of the premium is larger as the intrant gets older. For this reason only young men seek admission to the Scots Bar. Beneath the Bar come two privileged bodies of lawyers who have the exclusive right of practice in the Court of Session, and one of whom has to sign every writ issued out of the court, namely the "Writers of the Signet" and the "Solicitors of the Supreme Court." Lastly come the Law-Agents, Writers or Procurators, who correspond to our solicitors. In Scotland a Writer or Procurator may become a Sheriff, and very often does so. He may even become a Lord of Session, but there have been no appointments in modern times outside the Bar. In Scotland it is not nearly so easy to change from Barrister to Solicitor, or vice versa, as in England; in fact the process of translation takes some years. The Scots Bar, curiously enough, elects its own head, the Dean of Faculty, thus following the continental practice. Generally speaking, it may be said, that the separation into three branches, instead of two, and the general "apartness" of those three branches makes the Scots legal profession more

Unification of Federal Courts.—The introduction in the United States Senate by the Chairman of the Judiciary Committee of a bill to provide flexible administration in the Federal District Courts, is a forward movement in the cause of organizing the federal judiciary for effective work. Below is the address of Chief Justice Taft on this subject delivered before the Judicial Section of the American Bar Association at Cincinnati on September 1, 1921: The main purpose of government is the maintenance of law and order and the administration of justice. In modern days, of course, the functions of government have been largely amplified. Whether for the benefit or otherwise of the people, I am not here to discuss. But certainly the importance of impartial, prompt and effective administration of justice has not lost its importance in any change of view as to other functions of the government. The administration of justice is carried on by the co-operation of the courts, which interpret and enforce the law and the rights of parties under the law, and whose judgments are carried out by the executive. The courts are constituted of judges, and it is customary to assume that the administration of the law is largely within their control, and that where the law fails, and peace and order are not maintained, and rights of parties are not promptly settled, the judges are responsible. The judges are assisted in their labors by the members of the profession of the law, and that profession must share with the judges such responsibility as may be properly charged to them in the fulfillment of their great governmental function. What I would like to emphasize in this presence, however, is that while the judges of our courts have their faults, they may rightly excuse themselves in a large degree on the ground that the fault lies with the legislative power which does not provide them with adequate machinery for the prompt and satisfactory dispatch of business.

I doubt if there is a single element in the causes that render the administration of justice with us inadequate so important as its dedays. It is important, of course, that controversies be settled right, but there are many civil questions which arise between individuals in which it is not so important as that it be settled. Of course a settlement of a controversy on a fundamentally wrong principle of law is greatly to be deplored, but there must of necessity be many rules governing the relations between members of the same society that are more important in that their establishment creates a known rule of action than that they proceed on one principle or another. Delay works always for the man with the longest purse. It works always in favor of the corporation as against the poor litigant. If considerations of small economy, without a full understanding of the importance of the need for an adequate judicial machine, shall prevent its creation by law, then certainly the judges, who find it impossible to do the work which crowds into the court, are not to be blamed for it.

It is pathetic to one who has an intimate knowledge of the difficulties of the administration of justice, and the real reasons for its failure in the lack of proper legislation, to note the life-consuming effort of judges to do more work than they possibly can do, in order that the arrears in their dockets may not grow. I could point to instance after instance in which judges have worn themselves down in an effort to neutralize the negligence of legislatures in this regard. I know of one in Tennessee. Tennessee has three natural divisions, East Tennessee, Middle Tennessee and West Tennessee. It is a very long State and a very big State, and a State with a great deal of law business in the three parts, especially in the mountain districts, where the moonshine business is not a matter of recent growth but has always been there. For motives of false economy, while there are two districts, with separate clerks' offices and marshals' offices, there had never been more than one judge provided for the two districts. The amount of business there is overwhelming for one man. One able judge died before his time under the strain, and although the incumbent judge is one of the ablest district judges in the United States, and willing and anxious to devote all his time to the avoidance of arrears, the cases are piling up on him from year to year until his future is utterly hopeless, so far as the disposition of the business before him is concerned. A judge for the Middle District has not been furnished. Why? Because for years there was a fear that if the bill went through, one faction or one party would be successful in securing the appointment of its candidate.

The congestion which exists in many of the districts of the United States—and it has been growing because of the gradual enlargement of the jurisdiction of the courts under the enactment by Congress of laws which are the exercise of its heretofore dormant powers—has been greatly added to by the adoption of the Eighteenth Amendment and the passage of the Volstead law. Something must be done, therefore, to give to the Federal Courts a judicial force that can grapple these arrears and end them.

The Attorney-General has been much impressed with the great incrase in business in the courts, and has recommended to the President and to Congress the adoption of a law which it seems to me will much facilitate the dispatch of business in the courts of the United States. These courts have been aided by the Workmen's Compensation Act of the United States, which has transferred to a different tribunal the settlement of controversies that took up much time in jury trials; but in spite of this the other causes of increase in business have been so great that the number of cases pending is startling in its growth and size.

The bill which the Attorney-General has presented to Congress, and which has now been introduced by the Chairman of the Judiciary Committee of the Senate, adds to the judicial force of the United States two district judges at large in each circuit, or eighteen in all.

They are to have and exercise all the powers of district judges except that they may not make appointments of clerks and other officers which should obviously be made by judges knowing the vicinage. They are—as all judges must be—appointed, or created, under the judicial power of the United States, granted by the third article of the constitution, judges for life; but the provision of the new bill is that when any of these judges dies or resigns, his successor shall not be appointed unless Congress shall affirmatively so decide. This is as temporary a federal judge as the constitution will permit. These judges at large are to be assigned by the senior Circuit Judge to any district in the Circuit where needed and by the Chief Judge to any district in any other Circuit.

In the bill is another important feature that in a sense contains the kernel of the whole program intended by the bill. It provides for an annual meeting of the Chief Justice and the senior circuit judges from the nine circuits, and the attorney-general, to consider required reports from district judges and clerks as to the business in their respective districts, with a view to making a yearly plan for the massing of the new and old judicial forces of the United States in these districts all over the country where the arrears are threatening to interfere with the usefulness of the courts. It is the introduction into our judicial system of an executive principle to secure effective teamwork. Heretofore each judge has paddled his own canoe and has done the best he could with his district. He has been subject to little supervision, if any. Judges are men and are not so keenly charged with the duty of constant labor that the stimulus of an annual inquiry into what they are doing may not be helpful. With such mild visitation he is likely to co-operate much more readily in an organized effort to get rid of business and do justice than under the "go-as-you-please" system of our present federal judges, which has left unemployed in easy districts a good deal of the judicial energy that may be now usefully applied elsewhere.

The choice of men eligible for the position will be widely enlarged when they are to be selected from a circuit as distinguished from a district. The services of eighteen judges will be fully needed in addition to the existing judiciary, even though that may be better organized in attacking arrears.

The number of bills that are pending for additional district judges in various districts is great. In almost every district there is an effort to secure an additional judge. Some effort should be made without reference to this bill. On the other hand, in many districts the demand is personal and political and does not grow out of the real needs of the particular district. The adoption of the present bill will do much to satisfy every reasonable demand for additional judges on economical lines. This executive principle of using all the judicial force economically and at the points where most needed

should be adopted in every state, and when adopted will offer a remedy to a great deal of the injustice by delay that now exists. State judges, as well as federal judges, should be interested in the adoption of this federal measure as a model for the states.

We have a great many complaints of the failure of justice in trials which have great publicity in which the jury does not seem to do their duty. That subject I discussed in a paper read before the Bar Association in Montreal. I merely wish now to emphasize the fact that if legislatures take away the power of judges to conduct trials as they ought to be conducted, and as they have been conducted in English courts of justice and in Federal courts of justice since their organization, and reduce the judge to a mere moderator, the complaint for results should not be laid at the door of the judiciary —it must rest with the legislature.

The members of the profession, however, cannot escape criticism in the same way. With one or two exceptions, every state legislature is full of lawyers and the profession has a very great power, if it would exercise it, to perfect the machinery for the administration of justice. But too often lawyers in the legislature have allowed themselves to be influenced by personal considerations, by small jealousies of the power of judges and by shaping the administration of justice to suit the character of their particular practice. It is important that the responsibility for unsatisfactory legal procedure should be put where it belongs, and much of it, I am sorry to say, is due to the members of the profession who do not do credit to the profession in the discharge of their political duties in this regard.

Of course, we of the judiciary cannot go off scot free. We have defects of our own. A judge exercises a great deal of power. If he allows his head to be turned thereby, he becomes a danger to the community. If he is disliked by the Bar, it is ordinarily his own fault, because no member of the Bar is likely deliberately to antagonize him. All he has to do is to administer justice without fear or favor and teach the Bar that that is the principle upon which he is acting, and he will establish a position for himself among the lawyers that they will respect and recognize. Some trial judges are lazy, especially when their powers are taken away from them by the legislature, and do not give that close attention to the conduct of trials that all judges should exercise. When a judge does not follow every item of evidence and direct all his energies to the case before him, it will get away from him and the more powerful of the counsel will have a great advantage. Even under the most adverse legislation, a judge can exercise much influence in the trial of cases if he will only possess himself of the case and keep himself advised of every turn in the progress of the case. In addition to that, he may learn a great deal, and no matter how erudite and familiar he is with the principles of law, he still may learn something about the particular case.